

[Waiver 1992-5]
W-92-34

MEMORANDUM

June 3, 1992

TO: Mike M. Burdette, Administrative Services Coordinator
Department of Liquor Control

FROM: Jay L. Cohen, Chair
Montgomery County Ethics Commission

RE: Request for Waiver

The Ethics Commission has reviewed your request dated April 20, 1992, for a waiver under the Montgomery County Public Ethics Law.

Based on your written request, an interview with the Ethics Commission on April 29, 1992, and the "Report of the Montgomery County Liquor Control Policy Committee on a Proposed Test of Contracting Operations of Selected Department of Liquor Control Retail Stores" (Report) reviewed by Ethics Commission staff, the Ethics Commission understands the facts as follows:

You have asked the Commission to allow you to submit in conjunction with others a proposal in response to a Request For Proposals (RFP). The County intends to issue the RFP to procure the services of a qualified agent to operate one of three existing Department of Liquor Control (DLC) retail liquor stores. If successful, you ask permission to enter into a contract to operate one of these liquor stores.

You are the Administrative Services Coordinator for DLC. Your position will be eliminated effective July 1, 1992; you have requested, however, that you be allowed to remain in County employment until August 1, 1992.

As the Administrative Services Coordinator for DLC, your major responsibilities are: (1) provide administrative support to the Director of DLC; (2) review and sign off on various personnel actions; (3) coordinate meetings of the Liquor Control Policy Committee and the Alcoholic Beverages Advisory Board; (4) serve as a contract administrator for contracts administered by DLC; (5) coordinate DLC retail store leases; (6) prepare administrative reports; and (7) serve as coordinator of various administrative responsibilities, including training, program evaluation, and employee safety programs.

On November 12, 1991, the County Council adopted Resolution 12-452 which requested the County Executive, through the Liquor Control Policy Committee, to propose a pilot test to assist the County government in evaluating the advantages of contracting out the management of all 22 retail liquor stores operated by DLC.

The Liquor Control Policy Committee has released its Report which was publicly reviewed by the Council on April 28, 1992. According to the draft RFP in the Report, the method of contract award will be as follows: Written proposals will be evaluated utilizing criteria that include the proposer's merchandising qualifications, cash handling qualifications, inventory control qualifications, a start-up work plan, and a cash flow forecast. Interviews will be conducted for those proposers who are ranked in the top 25% of written proposals; interviews will be evaluated using the same criteria for evaluating written proposals. All proposers who score between 85% and 100% of the total available points will be put into Group 1. Proposers who score between 75% and 84% of the total available points will be put into Group 2. The bid of each proposer in Group 1 will then be opened and reviewed. The County will enter into contract negotiations with the proposer who had bid the lowest commission rate within Group 1. If a contract is not executed with the offeror with the lowest commission rate, the County will enter into negotiations with the proposer with the next lowest commission rate in Group 1. If a contract is not issued to a proposer in Group 1, the County will begin negotiations with the proposers in Group 2 in the order of the lowest bid commission rate.

The Ethics Commission understands that the County anticipates issuing the RFP before you leave County employment; in fact, proposals may be due under the RFP before you leave County employment. However, it is expected that contract awards will be posted and contract negotiations commenced after you leave County employment.

You have indicated that you wish to submit a proposal in conjunction with John McGraw and his spouse. McGraw was employed in DLC about 8 years ago. Before his employment with the County, McGraw operated a liquor store in Prince George's County. The McGraws have not had any involvement with the liquor business since McGraw's employment with the County.

Finally, you have indicated that you have not been involved in the development of the Report or any phase of the draft RFP, including selection criteria.

Section 19A-13(a) prohibits a former public employee from assisting any party, other than the County, in a case, contract or other specific matter for ten years after the last date the employee significantly participated in the matter.¹ Since you did not participate in drafting the RFP, Section 19A-13(a) would not prohibit you as a former employee from responding to the RFP or entering into a contract to operate a DLC retail liquor store.

Section 19A-13(b) prohibits a former public employee from entering into an employment arrangement, for a period of one year after leaving County employment, with any person or business that contracts with a County agency if the employee: (1) significantly participated in regulating the person; or (2) had official responsibility concerning a contract with the person. Since you had no official responsibility concerning a contract with the McGraws nor did you regulate the McGraws, Section 19A-13(b) would not prohibit you as a former public employee from competing for and

¹ Unless otherwise indicated, section references are to the Montgomery County Code (1984).

entering into a contract to operate a DLC retail liquor store in association with the McGraws.

Section 19A-12(e) prohibits a current public employee from assisting any party for contingent compensation in a matter involving a County agency except in a judicial or quasi judicial proceeding. The Ethics Commission believes that working with the McGraws to prepare a response to the RFP involves assisting another party for contingent compensation in a matter involving a County agency. Accordingly, so long as you remain a public employee, Section 19A-12(e) prohibits you from working with another to prepare or submit a response to the RFP.

Section 19A-8 authorizes the Commission to waive Section 19a-12(e) if the Commission finds that:

- “(1) The best interest of the County would be served by granting the waiver;
- (2) The importance to the County of a public employee performing his or her official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) Granting the waiver will not give a public employee an unfair advantage over other members of the public.”

In applying these criteria to the circumstances of this case, the Ethics Commission finds the following factors persuasive:

1. Providing a public employee whose job will be involuntarily terminated through a Reduction in Force with an opportunity to engage in gainful work, including contracting with the County, is in the best interest of the County.
2. The Director of DLC has approved this request for a waiver.
3. You have not been involved in drafting the RFP or in establishing the evaluation criteria for awarding a contract under the RFP.
4. A critical step in selecting a contractor under the RFP uses the lowest commission rate bid by an offeror. This criterion, unlike the other criteria, is objective and non-judgmental.

Accordingly, the Commission finds that the criteria under Section 19A-8 have been met.

The Commission grants you a waiver to work with the McGraws to prepare and submit a proposal under the RFP. This waiver is subject to the following conditions:

1. You may not as a public employee participate in the finalization of the RFP, the issuance of the RFP, the selection of the members of the Qualifications and Selection Committee, or the evaluation of proposals submitted under the RFP.

2. While a public employee, you may not enter into any negotiations or contract with Montgomery County.

If you have any questions regarding this waiver, please contact the Ethics Commission.